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INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

No. R. 524 **14 June 2010**

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AMENDMENT OF THE STANDARD TERMS AND CONDITIONS FOR

INDIVIDUAL AND CLASS LICENCES,

AS WELL AS,

AMENDMENTS TO THE PROCESS AND PROCEDURES REGULATIONS FOR INDIVIDUAL AND CLASS LICENCES

REASONS FOR DECISION

MAY 2010

A. INTRODUCTION

On 13 July 2009 and in Notice 978 published in Government Gazette 32402, the Independent Communications Authority of South Africa ("the Authority") published a notice requesting comments on the proposed amendments to the following regulations:

- Standard Terms and Conditions for Individual licences -Government Gazette No. 30530 of 2007;
- Standard Terms and Conditions for Class licences- Government Gazette No. 30512 of 2007;
- Process and Procedures regulations Individual licence -Government Gazette No. 398 of 2008; and
- Process and Procedure regulations for Class licence – Government Gazette No. 397 of 2008

B. SUBMISSIONS

1. The Authority has received written representations/ comments regarding aforesaid amendments from following entities:

- Altech Autopage
- Cell C
- ISPA
- MTN
- MNET
- MWEB
- NAB
- Neotel
- Telkom
- Vodacom
- WOW
- X-Link
- Sentech

2. In accordance with the discretion conferred on the Authority in terms of section 4(6) of the ECA, the Authority decided that it was not necessary to hold a public hearing with regard to the draft regulations. In the Authority's view, all issues raised as well as recommendations made in the submissions were sufficiently detailed.

C GENERAL COMMENTS: STANDARD TERMS AND CONDITIONS

With reference to regulations on standard terms and conditions, concerns raised by the sector centred on the following issues:

1 Notification of licensee details and information

Neotel submits that provision should also be made for delivery via electronic mail which has also been recognised by various courts.

With regard to the proposed regulation 3A (Ownership and Control), MWEB contends that there is no provision in the ECA which authorises the Authority to regulate and approve changes in the ownership and control of class ECS and ECNS. MWEB further contends that class licences are not subject to the ownership qualifications detailed in section 9(2)(b) of the ECA.

2 Safety measures

All operators question the inclusion of "regulatory broadcast standards" in an ECNS or ECS licence and indicate that it is not desirable. ISPA and MWEB argue that this regulation is a restatement of existing regulations which are already binding on licensees. Sentech stated that the reference to "regulatory broadcast standards" should be limited to broadcasters.

3 Provision of information

MWEB and Sentech challenge the reasonableness of subjecting Class licensees to this provision given the licensing framework under the ECA is designed to ensure less rigorous and onerous regulation for class licences.

Neotel argues that this regulation is too broad and should be narrowed and more detailed to enable the Authority to carry out its mandate, and that the terms used must be defined.

4 Publication of tariffs and fees

ISPA and Neotel state that a lengthy notification period is not ideal as the ability to respond timeously to their competitor's price changes is critical in a competitive environment. Cell C, MTN and Vodacom similarly argued that a 21 day notification period equated to a full calendar month filling period and would consequently adversely affect their ability to respond to pricing or market changes speedily. MWEB and Sentech argued that the regulation should be deleted in its entirety to the extent that it contradicts the Code of Conduct regulations which provide for a 30 (thirty) day period.

ISPA urges the Authority to revisit its decision to replace the word "end-user" with the term "public". ISPA further adds that that the new term "unjustifiably broadened the scope" of the regulation to the extent that "end-user" could also refer to another licensee and not simply the public. Sentech argues that the term "public" is used in the Code of Conduct. Telkom indicates that the words "end-user" and "public" should not be used as "end-user" is a person already making use of a licensee's services.

Neotel argues that the previous regulation 10 (1) (a)-(d) was too broad and should be narrowed and more detailed to enable the Authority to carry out its mandate and that the terms used be defined. Neotel also argued that provision should be made for licensees to dispute the reasonableness of the request for information and a format to be used for tariff notifications.

5 Metering and billing arrangements

Cell C opposes the notion of free provision of billing services on the basis that it amounted to undue interference in the commercial activities of licensees and that regulation of retail services should be undertaken after completing a Chapter 10 process. ISPA argues that the stated exclusion negatively affects the interests of prepaid users- the lower LSM groups. Sentech also questions the exception applied to pre-paid users and attests that this regulation contradicts the provisions contained in the Code of Conduct Regulations. Whilst MTN in contrast agrees with the exception applicable to pre-paid users, it is argued that production of itemised bills, including postage costs, is inherently costly. MTN further states that only 18% of its customers received their bills in an electronic format. MTN maintains that regulation 11 is a cost remedy. Nashua argues that billing provisions must be restricted to usage charges and these regulations should not apply to itemised billing which they view as a value added services.

6 Contravention and fines

ISPA argues that a maximum fine of R1 million is excessive. MTN and Sentech stated that the proposed fines are disproportionate to the nature or gravity of the contraventions.

D. REASONS FOR DECISIONS ON REGULATIONS REGARDING STANDARD TERMS AND CONDITIONS

The Authority considered all submissions and took into account all recommendations made in coming to its decisions. The Authority's reasons and decisions are as detailed below.

1. Safety measures

The Authority has decided to set aside proposed amendments to this regulation as the Code of Conduct regulations adequately address "regulatory broadcast standards".

2. Notification of licensee details and information

The changes proposed by draft regulation 3A have been consolidated with an amendment to regulation 3. For practical reasons, including distribution of urgent mail from the Authority, the Authority has decided to request licensees to submit changes to contact details and shareholding. Shareholding has been included in the list of notification to enable the Authority to ensure that licensees are acting in accordance with their licence conditions and the Act.

The Authority will not be using emails for delivery of notification until such time as all licensees have confirmed their email addresses.

The Authority acknowledges that Sections 9(2)(b) and 13 are limited to individual licensees, it nevertheless seeks to ensure that all licence categories, including community sound broadcasting licensees, comply with licence provisions and applicable regulations.

3. Publication of tariffs and fees

The Authority has decided to retain the original provision in the regulations and restrict the filing period to 7 (seven) days as an increase in the period may be cumbersome to a licensee operating in a competitive market environment. The Authority has noted the contradiction between this regulation and regulation 3.6 of the Code of Conduct regulation and will accordingly attend to the amendment of the latter. The Authority has decided to retain the term "end-user" as it is defined in the Act and extends to persons who use the service of a licensee. The Authority is of the view that the word "public" is inconsistent with the Act and the word "subscriber" is limiting because it does not allow for remedies in relation to transactions between licensees.

4. Metering and billing arrangements

This provision has been revised to reflect differentiated approaches as between invoices and itemised bills, and different modes of delivery.

The Authority concedes that the provision of itemised billing has cost implications and Licensees need to recuperate the costs they incur. Licensees have argued that itemised billing costs escalate with printing of paper and postage. The Authority, however, maintains that there are differentiated costs associated with the different modes of delivery of the itemised bill and associated savings should be passed on to end users and subscribers.

5. Contraventions and penalties

Further the fines herein represent a maximum subject to the discretion of the CCC, which fines would be imposed in respect of contraventions of these specific regulations.

E. SPECIFIC COMMENTS ON REGULATIONS REGARDING STANDARD TERMS AND CONDITIONS

1. CLASS BROADCASTING LICENSES

DEFINITIONS

A definition of "Public Service Announcement" is inserted. The insertion is informed by the need to have a comprehensive definition that will clarify the application of the relevant provision, in line with the revision of the provision governing public Service Announcements in the body of the regulations.

LICENCE AREA

This provision has been revised to improve clarity as regards the application to the different types of class broadcasting services licensees. The revised provision provides for separate definitions as per the different types of services as listed.

DURATION OF THE LICENCE

In accordance with the revision of regulation 8(types of services), a provision is inserted to regulate the duration of special events community sound broadcasting service licenses which will be subject to a shorter time period of validity of the licences as well as lesser extent of obligations as compared to the five (5) year Community Sound Broadcasting Service Licences.

SERVICES TO BE PROVIDED BY THE LICENSEE

In order to assist entry into the Community Sound Broadcasting environment, the Authority has decided to re-introduce Special Event Community Sound Broadcasting Service Licences.

PROVISION OF INFORMATION

The Authority has decided to delete the word "aggregate " from regulation 10(1)(d) as that unduly limits the powers of the Authority. Regulation 10(2) has been revised to enable the licensee to exercise discretion on related requests.

In the process of administering licensees, the Authority should be in a position to gauge the growth of the market and where possible points of stagnation, and thereby act in a proactive manner to market changes. The Authority concedes that the Act advocates for light touch regulation of class licences, however class licences cannot by virtue of their size be absolved from acting in an anti-competitive manner and the authority has no basis to assume such.

The Authority has circumscribed the scope of this regulation through the introduction of a compliance manual which should be finalised this financial year.

CHANNEL AUTHORISATION

Regulation 11 has been deleted in its entirety given the existing regulations which provide for channel authorisation have not been repealed, and DTT regulations provide for channel authorisation framework in the digital environment.

PUBLIC SERVICE ANNOUNCEMENTS

The Authority has decided to revise the regulation to add clarity, for consistency with the definition of "**public service announcement**" as inserted and to expand the scope of entities that may request the broadcasting of public service announcements.

CONTRAVENTIONS AND PENALTIES

The referencing has been amended to be in line with the revised numbering taking into account the deletions. Further the fines herein represent a maximum subject to the discretion of the CCC, which fines would be imposed in respect of contraventions of these specific regulations.

2 INDIVIDUAL BROADCASTING SERVICES LICENCES (SCHEDULE 1)

DEFINITIONS

A definition of "Public Service Announcement" is inserted. The insertion is informed by the need to have a comprehensive definition that will clarify the application of the relevant provision, in line with the revision of the provision governing public Service Announcements in the body of the regulations.

SERVICES TO BE PROVIDED BY THE LICENSEE

The regulation has been deleted as nothing turned on it.

CHANNEL AUTHORISATION

The regulation has been deleted in its entirety for reasons provided earlier.

PUBLIC SERVICE ANNOUNCEMENTS

The Authority has decided to revise the regulation to add clarity, for consistency with the definition of "public service announcement" as inserted and to expand the scope of entities that may request the broadcasting of public service announcements

3 INDIVIDUAL ELECTRONIC COMMUNICATIONS SERVICES LICENCES (SCHEDULE 2)

DURATION OF THE LICENCE

Having considered the duration of the Individual Electronic Communications Network licenses, the Authority decided that it is appropriate for the service licence to have a similar duration to the Network Service Licence. It is accepted that this will enable holders of both licensees to plan more efficiently in terms of their business and investment plans.

F. GENERAL COMMENTS: PROCESS AND PROCEDURES REGULATIONS

With reference to process and procedures regulations, concerns raised by the sector centred on the following issues:

1. SUBMISSION OF APPLICATIONS AND OTHER DOCUMENTS IN TERMS OF THESE REGULATIONS

ISPA states that the term notification must be defined or replaced. MTN similarly raised concerns about the appropriateness of the term.

MWEB indicates that regulation 5(7) in the amendment notice must be amended in order to clarify that the term "notification" is limited to notifications made in terms of regulation 3.

2. LICENCE EXEMPT SERVICES AND NETWORKS

In respect of Form M, ISPA argues that to view a licence exemption as requiring authorisation is incorrect and in conflict with Section 6 of the ECA. ISPA indicates that the term registrant is preferable. ISPA further argues that the form fails to make provision for the form of exemption sought by the registrant.

In respect of Form J, ISPA argues that provisions relating to temporary authorisations as provided for in Section 3.3 and Section 3.5 of Form M are best captured in Form J.

ISPA further argues that there is no requirement for those operating Small Electronic Communications Networks (SECNs) such as LANs, WANs and hotspots as well as those who intend to offer ancillary services, to notify the Authority of the existence of such networks or their operations.

Neotel submits that the Authority should make provision for licensees to defer or make alternative arrangements to pay outstanding fees in instalments. Neotel further indicates that the Authority should provide a schedule of fees payable in respect of notices.

Neotel and ISPA state that an exempted service should not be applied for and that entities seeking exemption should submit a notification.

MWEB asserts that regulation 6 should incorporate a sub-regulation which clarifies that no fees are payable in terms of the stipulated amendments.

Telkom maintains that there is no need to subject all PECN's to the processes as set out in the regulations. Telkom suggests that only PECNs that resell spare capacity should be subjected to the regulations given the extensive number of PECNs that that use their network for internal operations.

G. REASONS FOR DECISIONS ON REGULATIONS REGARDING PROCESSES AND PROCEDURE

The Authority considered all submissions and took into account all recommendations made in coming to its decisions. The Authority's reasons and decisions are as detailed below.

1. LICENCE EXEMPT SERVICES AND NETWORKS

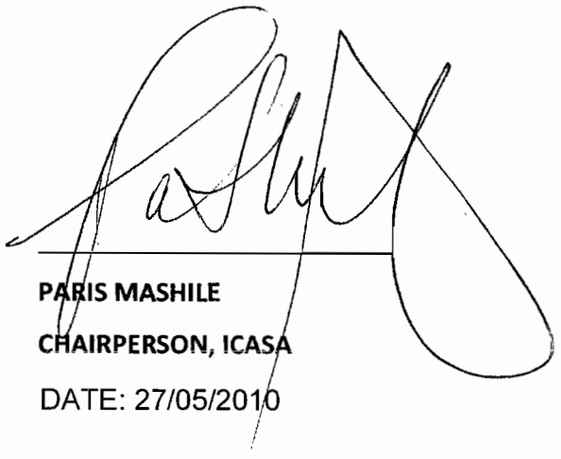
The Authority introduced an additional form, Form N, to provide for authorisations to support special events and temporary community television broadcasting services. The Authority has accordingly added regulation 12 to prescribe the applicable regulatory framework.

The regulations are designed to provide a framework for processes and procedures not fees. Regulations on administrative fees are adequately covered in the licence fees regulations published in General Notice 526 of 2009 in Government Gazette No. 32084, of 01 April 2009. The Authority wishes to point out that there are no fees payable in respect of notifications in terms of these regulations. The Authority does however accept that regulation 6 should clearly state that no fees are payable in terms of amendments to applications. The Authority further concedes that the term "notification" as stipulated in the amendment notice is potentially confusing and has accordingly limited the term to mean notification in terms of regulation 3. The Authority will make same changes to the individual process and procedures regulation in order to ensure that there is consistency.

The Authority is aware of the provisions outlined in section 6 of the ECA, however the Authority needs to maintain a registry of all exempted entities. In view of the latter the Authority does not accept the rationale for exempting PECNs that use their network principally for internal operations. The Authority concurs with ISPA that persons who intend to provide ancillary services or operate small electronic communications networks need not notify the Authority. The Authority concedes that entities seeking exemption should simply notify the Authority and there is no fee that is payable in respect of notifications.

2. SUBMISSION OF APPLICATIONS AND OTHER DOCUMENTS IN TERMS OF THESE REGULATIONS

The Authority added regulation 5 (7) to clarify that no fees will be payable in respect of notifications as the administrative costs are minimal. The Authority has also introduced Form F.



PARIS MASHILE

CHAIRPERSON, ICASA

DATE: 27/05/2010